SOON SENG COMPANY SDN BHD

v.

TOKO PALAYAKAT JAMAL (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-869-1997]
17 NOVEMBER 1998

LAND LAW: *Caveat - Private caveat - Application to remove caveat - Plaintiff paid deposit for sale of land - Defendant entered caveat on basis that it paid part of purchase price - Whether plaintiff an aggrieved person - National Land Code 1965, s. 327(1) - Whether defendant had a caveatable interest - Whether consent of court required for sale of property to defendant*

The plaintiff applied to remove the private caveat entered by the defendant on the property it intended to purchase. The plaintiff had already paid the 10% deposit for the said property ('the property'), ie, RM115,000 to the administrator of the property. Subsequently the defendant entered the caveat on the basis that it had paid a sum of RM55,000 towards the purchase of the property.

The issues were: (1) whether the plaintiff was an aggrieved person under s. 327(1) of the National Land Code 1965 ('NLC'); (2) whether the defendant had a caveatable interest; (3) whether the agreement between the plaintiff and the administrator for the sale of the property was a conditional contract; (4) whether the plaintiff could chose to elect specific performance of the said agreement when earlier it had claimed for rescission; and (5) whether since the administrator had already obtained the court's permission earlier for the sale of the property to the plaintiff, there was a need to obtain a second permission for the sale of the property to the defendant.

Held:

[1] An aggrieved person is one whose legal right or interest in property is adversely affected by the wrongful act or conduct of another person or body. The plaintiff was an aggrieved person under s. 327(1) of the NLC as it was obvious on the facts that the defendant's caveat would affect the plaintiff's legal right to the property.

[2] Once an applicant has shown that he is an aggrieved party, it is the caveator's duty then to prove that he has a caveatable interest. The caveatable interest of the defendant was clearly suspect and the defendant failed miserably the "meticulous scrutiny" test as propounded by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor.*

[3] The question of conditional contract between the plaintiff and the administrator for the sale of the property did not arise. This was because by forwarding a cheque for the balance of the purchase price, the plaintiff had waived any conditions operating against it.

[4] An election becomes effective only when a party adopts and maintains a stand as opposed to a possible alternative stand, throughout the entire case and up to its conclusion. Even before the hearing commenced, *albeit* 10 years after pleading rescission, the plaintiff now contended for specific performance. The issue of election therefore could not arise.

[5] When the court gave its consent for the sale of the property to the plaintiff, it was aware of the details of the sale including the fact that the total purchase price was RM1,150,000. The total purchase price of the sale to the defendant was never disclosed. The grounds stated therein for the caveat indicated that the purchase price was only RM55,000. This meant that the beneficiaries were being defrauded. The court would not lend its benign hand to any nefarious schemes.

[5a] The administrator ought to have obtained a fresh consent pursuant to s. 60(4) of the Probate and Administration Act 1959 for the sale of the property to the defendant. The failure to obtain such a consent must, *prima facie*, render the contract, if any, between the defendant and the administrator voidable pursuant to s. 60(6) of the said Act. On this score too, the defendant had failed to establish a caveatable interest.

[Application allowed.]

Cases referred to:
Eng Mee Yong & Ors v. V. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Goh Paik Swan v. Ng Choo Lum [1997] 1CLJ 77 ***(refd)***
In Re Registration of Caveat [1908] Innes 114 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 ***(foll)***
Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 323, 327(1)
Probate and Administration Act 1959, s. 60(4), (6)

For the plaintiff - Ahmad Moosdeen (V Balasingam with him); M/s Balasingam & Co
For the defendant - Shahul Hameed Amirudin; M/s Albar Zulkifly & Yap

Reported by Kavitha Gunasegaran

JUDGMENT

RK Nathan J:

The Application

This is the plaintiff's application to remove a private caveat lodged by the defendant on land held under C.T. No. 14860 Lot 75 Seksyen 6 Bandar Kuala Lumpur with a double storey shop house No. 23 of Jalan Melayu, Kuala Lumpur, on it (the said property).

Facts

The registered owner of the said property is one K. Abdul Rahim who died intestate on 25 March 1977. The administrator of the estate of the deceased, one Abdul Rahim @ Packeer Mohamed bin M. Esmailsha (the administrator) entered into a written agreement with the plaintiff on 28 December 1983 (the agreement) to sell the said property to the plaintiff for RM1,150,000. The plaintiff paid the usual 10% deposit amounting to RM115,000 pursuant to the said agreement, to the administrator's solicitors as stakeholders. As was required by s. 60(4) of the Probate and Administration Act 1959, the administrator obtained the consent of the court to sell the said property to the plaintiff.

Soon a dispute arose between the plaintiff and the administrator. The plaintiff contended that the administrator had obtained the court's consent out of time and refused to pay the balance of the purchase price. The administrator sued for specific performance of the said agreement in the Kuala Lumpur High Court by way of Civil Suit No. S6-22-162-87 (the suit). The plaintiff counterclaimed for a rescission of the said agreement and for a refund of the deposit. The case is still pending.

On 17 September 1994 the defendant entered a caveat over the said property on the basis that it had paid a sum of RM55,000 for the purchase of the said property. The mandatory Form 19B filed by the defendant pursuant to s. 323 of the National Land Code 1965 (the NLC) states the following reasons for entering the caveat:

> (a) Kami berhasrat untuk membeli harta tanah di bawah pegangan hak milik C.T. No. 14860 Lot No. 75 Section 6, Bandar of Kuala Lumpur ("harta tersebut") daripada Abdul Rahim Packeer dan Mohammed bin M. Esmalsha pentadbir pusaka yang sah kepada Estet K. Abdul Rahim @ Abdul Rahim Kadar Batcha, simati ("Penjual tersebut"), pemilik berdaftar harta tanah tersebut.

(b) Sehingga kini kami telah pun membayar wang sebanyak RINGGIT LIMA PULUH LIMA RIBU (M$55,000-00) sahaja kepada penjual tersebut sebagai bayaran terhadap belian tersebut.

(c) Kaveat Persendirian ini dimasukkan untuk menjaga kepentingan kami terhadap harta tersebut sementara menunggu pindahmilik harta tersebut disempurnakan.

The plaintiff in the meantime, decided to complete the sale and purchase and tendered payment of the balance purchase price to the administrator's solicitors by way of the plaintiff's solicitors' letter dated 24 July 1996. In the said letter the plaintiff intimated it was desirous of discontinuing its defence and counterclaim for rescission and for the refund of the money, in the suit. Since the administrator refused to sell the said property to the plaintiff by refusing to accept the balance of the purchase price, the plaintiff applied to amend its defence and counterclaim to one of specific performance of the said agreement. The amendment was contested. However, the Senior Assistant Registrar (SAR) allowed the amendment on 13 September 1997. The appeal to the judge against the decision of the learned SAR was dismissed on 14 September 1998. In the meantime, the administrator then withdrew its claim for specific performance of the said agreement and is opposing the plaintiff's amended counterclaim for specific performance.

Another matter of importance in the chronology of events must also be recorded. The plaintiff had caveated the said property on 16 December 1993. The defendant applied to remove the said caveat. Since the plaintiff failed to attend court on 14 May 1997 on the hearing of the defendant's application, the caveat was removed. The plaintiff's application for re-instatement of this caveat has not as yet been heard.

Whilst the defendant entered a caveat over the said property on 17 September 1994, the plaintiff lodged its second caveat over the same property on 15 July 1997.

Aggrieved Person Under S. 327(1) Of The NLC

Section 327(1) of the NLC reads:

(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

In respect of section 327(1) there are two issues to be considered, namely, (1) whether the plaintiff is an aggrieved person under s. 327(1) of the NLC to entitle him to apply to remove the caveat, and (2) whether the defendant

has shown a caveatable interest in the property. It is obvious that an aggrieved person is one whose legal right or interest in property is adversely affected by the wrongful act or conduct of another person or body. This is what Mokhtar Sidin JCA said in *Wu Shu Chen & Anor v. Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 at p. 499:

> The Code contains no definition on who is an aggrieved person. To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

In fact in *In Re Registration of Caveat* [1908] Innes 114 the court held that where a proprietor of land who had taken a loan from a moneylender gave an oral promise to charge the land by way of a security, the promisee could lodge a caveat to protect what was described as a caveatable interest which he had acquired on the land by reason of his promise. In other words, even the moneylender was able to caveat the land.

Applying the law as set out in *Wu Shu Chen* and the decision of the Privy Council in *Eng Mee Yong & Ors v. V. Letchumanan* [1979] 2 MLJ 212 PC with the facts of the case before me, I find that the plaintiff is a person aggrieved under s. 327(1) of the NLC. He has entered into an agreement to purchase the said property from the administrator of the deceased registered owner. The court has also given its consent for the sale of the said property to the plaintiff. In pursuance thereof the plaintiff had paid a sum of RM115,000 as deposit to the administrator's solicitors as stakeholders, and which said sum is still in the said solicitors' possession. The plaintiff had successfully sought an approval from the court to amend the defence and counterclaim to only now pray for specific performance. There has been no further appeal by the administrator against the learned judge's decision to uphold the learned SAR's decision to allow the amendment, which meant that the administrator had accepted the decision that the counterclaim for specific performance was not frivolous nor baseless. It is obvious that the defendant's caveat will affect the plaintiff's legal right to the said property.

Has The Defendant Shown A Caveatable Interest?

The Privy Council through *Eng Mee Yong* (supra) decided that once an applicant has shown that he is an aggrieved party, it is the caveator's duty then to prove that he has a caveatable interest. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719 CA the Court of Appeal set 3 stages for this court to consider before ordering the removal of a caveat. First the court is to examine the caveat itself, that is, to look into Form 19B

and the reasons stated therein for imposing the caveat. If no caveatable interest has been shown, the caveat ought to be removed without the need to consider the remaining two stages. If Form 19B shows a caveatable interest, the court then moves on to the second stage. The second stage is when an aggrieved party applies to remove the caveat. The court then examines the affidavit evidence of the caveator to find out if the evidence supports the caveatable interest claimed in the Form 19B or shows that the claim to a caveatable interest raises a serious issue to be tried. The court is to examine the evidence in detail and closely. If the evidence does not support the claim to a caveatable interest or that there is a serious issue to be tried on this point, the court is to remove the caveat without going to the third stage. Once the first two stages are satisfied, then the court must decide as a third stage, where the balance of convenience lies. It must be noted that at the second stage the caveator is not allowed to justify the retention of the caveat on a ground different from that set out in his Form 19B and the court is required to subject the caveator's affidavit evidence in support of the caveatable interest, to "meticulous scrutiny" (see *Goh Paik Swan v. Ng Choo Lum* [1996] 3 MLJ 437). In *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 MLJ 782 the Court of Appeal held that the caveator must show an enforceable contract to have a caveatable interest. In *Wu Shu Chen,* the caveat was removed because the caveator had merely stated in the Form 19B that they had a caveatable interest "by virtue of certain document" which they did not exhibit. Mokhtar Sidin JCA said at p. 503:

> As can be seen in the said para 2 above, Goh had not disclosed what that so-called 'certain document' was. He chose to hide it from the world at large and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be.

Considering the facts of the case before me, the defendant's Form 19B states in effect that the defendant purchased the said property from the administrator and paid RM55,000. That is all. The affidavit in reply opposing the application merely says:

> Since the Defendant was in possession by reason of the matters abovestated, it entered into negotiations and concluded the Sale and Purchase Agreement on terms and conditions. The contents of the agreement including the purchase price and terms etc are matters between the Vendor and the Purchaser and need not be disclosed to third parties including the Plaintiff.

It is obvious that the defendant had deliberately set out not to reveal the terms and/or the purchase price of the said property and whether there exists any oral or written agreement. He merely states that he has paid $55,000 and there is no evidence what the balance of the purchase price is. As said by Mokhtar

Sidin JCA in *Wu Shu Chen* this court is posed with the question whether the defendant has indeed something to hide. Was there indeed an agreement? Or if there indeed was a written agreement did it contain anything that would vitiate the agreement thus clearly showing a non-caveatable interest. On the other hand, no satisfactory explanation has been given why the balance of the purchase price has not been stated. Or is this court to assume that the total purchase price was only RM55,000. If this be the case then surely something is amiss. Why is the administrator rejecting a sale that would bring in RM1,150,000 and proceeding to enforce a sale that would give the beneficiaries only RM55,000. The caveatable interest of the defendant is clearly suspect and in my view the defendant has failed miserably the "meticulous scrutiny" test propounded by the Court of Appeal in *Luggage Distributors*.

Question Of Conditional Contract

In its submission the defendant referred to the agreement signed between the plaintiff and the administrator for the sale of the said property on 28 December 1983 as a conditional contract. In its reply the plaintiff questioned the contention of the defendant that the said agreement was a conditional contract. The plaintiff's surprise is ill-founded. The plaintiff itself has averred in its affidavit in support of the originating summons that the contract was a conditional contract. Neither party has in any case stated in their respective submissions what the operative conditions are. However, even if it is a question of any conditions operating against the plaintiff, the plaintiff has waived such conditions by forwarding a cheque for the balance of the purchase price.

Had The Plaintiff In Fact Elected For the Rescission?

Whilst it is an admitted fact that the plaintiff had initially filed a defence and counterclaim to the said suit by pleading for rescission of the contract and asking for a refund of the deposit, the plaintiff had a change of heart and amended its pleadings to ask for specific performance of the contract. To my mind an election becomes effective only when a party adopts and maintains a stand as opposed to a possible alternative stand, throughout the entire case and up to its conclusion. In the case before me, even before the hearing has commenced, *albeit* about ten years after pleading rescission, the plaintiff has now contended that he wants specific performance. The issue of election therefore can never arise in this case.

Is There A Need For The Administrator To Re-Apply To The Court

It is the defendant's argument that since the administrator had already obtained the court's permission earlier for the sale of the said property to the plaintiff, there was no need to obtain a second permission for the sale of the said

property to the present defendant. This argument is flawed from inception. The reason why the court requires its consent for the sale of any immovable property of a deceased by the administrator pursuant to s. 60(4) of the Probate and Administration Act 1959 is to protect the interest of the beneficiaries. When the court gave its consent for the sale of the said property to the plaintiff, it was aware of the details of the sale including the fact that the total purchase price was RM1,150,000. Surely common sense dictates that if the administrator contends that the earlier agreement to sell based on which the court's consent was obtained is deemed aborted, then the court's fresh approval must be obtained for a subsequent sale. This is all the more imperative in this case when (a) the total purchase price has never been disclosed, and (b) the wording of the grounds as stated in Form 19B indicates that it is possible that the purchase price was only RM55,000. This would mean that the beneficiaries are being defrauded. The court will not lend its benign hand to any nefarious schemes. I therefore hold that the administrator in this case ought to have obtained a fresh consent pursuant to s. 60(4) of the Probate and Administration Act 1959 for the sale of the said property to the defendant. The failure to obtain such a consent must, *prima facie*, render the contract, if any, between the defendant and the administrator voidable pursuant to s. 60(6) of the said Act. On this score too the defendant has failed to establish that it has a caveatable interest.

I therefore allow the plaintiff's application and order that the private caveat lodged by the defendant on the said property be removed from the register document of title by the registrar of titles. I also order that the defendant do pay the plaintiff damages to be assessed by the Deputy Registrar of the High Court. The plaintiff shall have the costs of this application to be agreed or taxed.